84-1892 (1)

No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ADELINA F. CICIRELLO,

Petitioner,

—against—

NEW YORK TELEPHONE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Petition:
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59pp

QUESTIONS PRESENTED

1. When a conflict exists between the Tenth Circuit and the Second Circuit in regard to whether summary judgment should be granted in retaliatory discrimination cases, should the Tenth Circuit rule that summary judgment not be granted, be adopted for all the circuits?

2. Whether a retaliatory discrimination action can be dismissed as moot on a motion for summary judgment where an employee has been involuntarily retired after a constructive discharge?

PARTIES

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Petitioner, ADELINA F. CICIRELLO, respectfully prays that a Writ of Certiorari be issued to review the order of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 5, 1985, granting summary judgment dismissing the claim.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit is annexed hereto as Exhibit "A". The memorandum and order of the United States District Court for the Southern District of New York, by Judge Kevin Thomas Duffy, dated October 10, 1984 is annexed hereto as Exhibit "B".

JURISDICTION

The opinion and order of the Court of Appeals was entered on March 5, 1985 and this Petition for Certiorari will have been filed within ninety (90) days of that date. This Courts jurisdiction

is invoked under

28 U.S.C. Sec. 1254 (1).

STATUTORY PROVISIONS INVOLVED

42 United States Code, Section 2000(e)-3 provides:

> (a) "It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by the subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation proceeding or hearing under this subchapter".

42 United States Code,

Section 2000(e)-5(g) provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without backpay ... or any other equitable relief as the court deems appropriate. Back liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.
>
> .....

STATEMENT OF THE CASE

The within matter arises from the granting of summary judgment by the District Court, Southern Distirct in a case of alleged retaliatory sex discrimination. Petitioner, a long time managerial employee of Respondent, TEL. CO., first sued TEL CO., in the Southern District in March 1981 after she discovered that Respondent had violated a 1974 consent decree of the Distirct Court, Eastern District of Pennsylvania, the substance of which had not been revealed to her. The District Court, in the Southern District of New York, dismissed that case, holding that such a suit could only be commenced in the Eastern District of Pennsylvania, and further asserted a failure to meet the jurisdictional requirements in filing a sex discrimination case with the E.E.O.C. prior to the Civil suit.

On February 5, 1982, a charge

was filed by Petitioner, with the E.E.O.C., but no action was instituted by her on this charge within ninety (90) days.

In June 1982, Petitioner sued in the New York State Supreme Court claiming fraud resulting from TEL CO.'s failure to disclose the substance of the 1974 Eastern District of Pennsylvania consent decree although it required notification and reports to affected female managerial employees. Nevertheless, the New York Court dismissed the action holding that the Petitioner should have sued in Pennsylvania despite Petitioners assertion that the subsequent fraud represented a new and separate cause of action.

On October 1, 1982, Petitioner was told by her superior at TEL. CO., that she was to be demoted and to report to her new non-managerial position at another

location after the weekend. The psychiatric pressure of retaliatory acts culminating in this last demotion caused the Petitioner to become ill, and disabled and she did not report to her newly assigned demoted position. Thereafter, she received 52 weeks of company disability benefits and was thereafter unilaterally retired by TEL CO., on a service pension approximately one (1) year after the notice of demotion. Her pension rights were substantially less than she would have been entitled to with a later retirement or if she had received periodic promotions as she was entitled.

On October 11, 1982, approximately 10 days after having been notified of her demotion, Petitioner filed a second charge with the E.E.O.C., alleging that the proposed demotion and subsequent deleterious effect on her emotional and physical health was caused by TEL CO.'s retaliatory intent

against her because of her actions in filing the February 5, 1982 sex discrimination charge and her other claims. The E.E.O.C., declined, on January 25, 1983, to make such a finding, but issued a right to sue letter. Thereafter, Petitioner again sued in the District Court, Southern District of New York. In that action, ultimately dismissed by the Court below, which is the subject of this writ, she alleged a continuous pattern of intimidation and harrassment, unjust demotions, harsh and unfair job evaluations on which promotions were based, and repeated actions for transfers to new locations and positions.

The District Court, in the decision appealed from, acknowledged that summary judgment should not have been granted if a genuine issue of fact existed, but, determined that no demotion had occurred on October 1, 1982, since Petitioner had never reported to her new

demoted position because of her medical disability. The District Court acknowledged the argument of Petitioner that the demotion occurred when notification was given of the personnel action, but rejected it in favor of Respondent's assertion that the notice did not become effective because before reporting to the new demoted position Petitioner became ill and went on disability. The Petitioner received disability benefits and pension payments based on the salary and managerial level that existed on October 1, 1982, when she received notice of her demotion.

The Second Circuit affirmed the District Courts decision "for substantially the reasons" set forth in the decision. It is to be noted that the decision was rendered one day after argument and is without opinion.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals of the Second Circuit is in conflict with that of the Tenth Circuit and such conflict should be resolved by reversing the decision below in favor of prohibiting summary judgment as being used to preclude recovery in a retaliation case.

The essence of the District Courts decision was that summary judgment should be granted on the issue of mootness.

The Tenth Circuit in the case of Romero v. Union Pacific Railroad, 615 F2d 1303, has ruled that in an employment discrimination case based on retaliation, the question of retaliation is inappropriate for summary judgment disposition.

Its exact language is as follows:

> Finally, the question of retaliation is particularly inappropriate for summary judgment disposition, since the primary issue is one of intent and motive. Jeffries v. Harris County Community Action Asso. 425 F.Supp.

1208 (S.D. Tex. 1977); Kornbluv v. Sterns & Foster Co., 73 F.R.D. 307 (S.D.Ohio 1976). Romero v. Union Pac. Supra 1309
In reporting the decision the

Federal Reporter has cited the Civil Rights Act of 1964, and the U.S. Code annotated. Its exact headnote is as follows:

> In employment discrimination case based on retaliation, question of retaliation is inappropriate for summary judgment disposition. Civil Rights Act of 1964 Sec. 703(a)(1) (c), 704(a) as amended 42 U.S.C.A. Sec. 2000e 2(a)(1), (c), 2000e 3(a); Fed. Rules Civ. Prac. Rule 56, 28 U.S.C.A. Ibid 1303.

The instant case thus presents a square issue of a difference in interpretation between two circuits in the United States. In one Circuit there is the firm rule that summary judgment should not be granted with sound reasoning in a retaliation case. Obviously, motive and intent can never be determined on a motion for summary judgment.

The Second Circuit decision, in the case at bar, is to the contrary and it is respectfully submitted that the Supreme Court

should grant Certiorari in order to resolve this conflict.

Obviously, the Petitioner supports the reasoning of the Romero case as being the better view. Since the Second Circuit failed to render an opinion, we are deprived of the benefit of its reasoning in the case at bar.

Nor is the issue of "mootness" novel or unique in the case at bar, so as to distinguish the case at bar from the Romero decision.

The very issue whether or not the case was "moot " was a question of fact since Petitioner argued below that she actually had not been retired in accordance with the employers regulations; that her disability may be cured in the future and enable her to return to work; and that she had been severely damaged by the rate of pension and disability relief she was required to take because of her early retirement.

Indeed the dual effect of deprivation of advancement in the past and constructive discharge (accompanied by diminished pension rights) were factual issues to be determined by a trial.

All sorts of subsidiary factual issues were to be determined such as whether or not a discharge had occurred before the Petitioner became disabled and reported to her new "line" position as opposed to a managerial position; whether she actually was retired in accordance with her legal rights and Respondents rules and regulations; and whether her retirement deprived her of damages based on retaliation.

These issues have never been determined and if the enforcement of the retaliation statutes are to be limited by the more powerful employers attempt at motion practice and discharge of its

obligations, the rights of employees retaliated against will be severely curtailed.

But the case at bar begs for a Supreme Court review because of the deleterious repressive manner in which summary judgment was applied which may have national impact.

The granting of summary judgment below was the result of two mechanisms which have constitutional import and it is respectfully submitted, were improperly applied.

The first mechanism, was the employers action in purporting to "retire" the employee unilaterally while she was suffering a disability. This act of Respondent employer, was the lever utilized by the District Court to find that the issue of the Petitioners lawsuit below was moot. Obviously, if the Petitioner was still an active employee of Respondent, no such finding below would have been made within the confines of the District Courts reasoning as expressed in its decision.

The constitutional issue

now raised is whether an employer can frustrate a retaliation action after constructively discharging the employee. (Causing her such physical and mental harm that she becomes disabled) by retiring the company employee against her will while disabled.

The mechanism is more sophisticated and challenging in its import that would superficially appear. It can be utilized as a universal method of frustrating all retaliation actions where the employee becomes disabled. As a result of the affirmance by the Second Circuit, retaliatory discrimination actions can be met with a claim of mootness because of the unilateral act

of the employer in effectively discharging the employee by virtue of "retirement" and eliminating a burdensome lawsuit.

The second mechanism used in the instant case, with constitutional overtones, is the District Court's failure to appreciate that it was making factual determination on the motion for summary judgment, and that these factual rulings were not only incorrect, but also repressive with respect to congressional intent. The Court below assumed that because the Petitioner went on disability before actually reporting at her demoted position, that factually, and as a matter of law, she had not been demoted. Secondly, the Court below assumed that no damages had occurred because that disability was paid consistent with the management position Petitioner had at the date of her notice of demotion. The Court overlooked the factual issues of a cumulative and

continuous debasing series of demotions, non promotions, and failure to give appropriate work reviews, which resulted in the Petitioners having been restrained from further management advancement, all as part of her retaliatory complaint. The judgment of the Court below that it was clear that the Petitioner had left before a demotion, certainly flies in the face of the record, but it is a factual finding that should not have been made on summary judgment. The most troubling factual finding by the District Court was the alleged lack of dispute that the Petitioner was totally disabled, and ergo "can no longer be considered as an active employee". This assumes that each disability is "uncurable"; that no one ever recovers from injury; and that all of the state statutes which limit disability payments for a specific period of time are, therefore, unrealistic. There was no factual finding of whether the employer had a "right" to "retire" the Petitioner.

Again, the issue that a disabled person could not be considered an "employee" because such disability continued forever, is a factual finding with no basis in the record, nor is there any evidence that the District Court delved into the type of disability and the statistics or prognosis for recovery. Consequently, the issue of "mootness" was hinged on the two mechanisms inter-related: a sophisticated and "slick" act of the employer in seizing the disability which it caused as a means of claiming mootness; and the District Courts acceptance of the logic that disabilities so caused are permanent and justifying the avoidance of a triable issue. The offending employers can now use "mootness" as an argument against a claim of retaliation when the employer itself is the instrument of causing the disability.

Again, the national and

constitutional implications are clear: A diabolical and systematic stripping of promotional benefits; payment of disability at the reduced managerial level for a long time employee; forced retirement at the reduced managerial level;and disqualification of the retaliated employee from legal claim.

This is not an innocent employer in an isolated instance of sex discrimination against a woman. As the appendix will indicate, the consent decree in 1974 was to be distributed to the affected employees with notifications given to the supervising governmental agency. What effect was this decree if indigent employees were required to seek counsel in a foreign State, out of the ambut of their employment site in order to obtain justice? Of what effect was the notice obligation for the employer if the employer fraudulently failed to notify the female management employees of the content

of the consent decree?

Surely, this Petitioner, with her limited knowledge and means sought to perfect her rights where no timely written notice had been given to her of the substantial benefits of the consent decree applicable to her.

Nor did the Court below inquire as to what diminished pension rights, disability rights, medical treatment and insurance rights, the Petitioner was subjected to, because of her disability and retirement at the low management level which existed immediately prior to her demotion when the pattern of retaliation existed prior to the date of actual dismissal.

The learned District Court and Second Circuit of Appeals also failed to follow the guidelines set forth by the Second Circuit in Sheehan v. Purolator Courier Corp., (676 F.2d 877 (1981).

In that case, the Court acknowledged its right to fashion any appropriate remedy to protect a discriminated employee. Applying the case to the case at bar, the District Court could have ruled that when the Petitioner was free from disability, she would revert to her former position at the managerial level, could have obtained medical testimony as to what beneficial effect a declaration of the Petitioner rights might have on her forced retirement, or ascertain whether the Petitioner would disdain her disability in order to return to an equitable managerial position, less onerous. All of this possible relief was not "moot". The Tenth Circuit, in the case of Muller v. United States Steel Corp., 509 F.2d 923 (1975), has recognized the importance of an analysis of constructive discharge of a plaintiff. While the Muller finding was negative as to constructive discharge, the case at bar

is a direct example of the cause and effect of the announced demotion and the mental and physical break-down of the employee resulting therefrom. Reference was made in the Miller case to the holding in the Stevens case (J.P. Stevens & Co. Inc., v. NLRB, 461 F.2d 490 (4th Cir. 1972) which held that an employer can deliberately render the employees working condition so intolerable as to force them to quit the job thus constituting a constructive discharge.

Indeed, the Second Circuit in still other cases recognized a liberal attitude towards computing damages. Grant v. Bethlehem Steel Corp., 622 F.2d 43 (1980).

It is respectfully submitted that the Court of Appeals, Second Circuit, overlooked the broader aspects of the deft moves by the employer to preclude the instant retaliation case. The mechanism of

forced retirement one year after a retaliation claim is made, as a vehicle to moot the case, is not to be encouraged.

The District Courts effort to find an absence of a factual issue, flouts the decision of the Tenth Circuit Romero case Supra, attacking the inappropriate nature of the remedy of summary judgment where the issues of "motive and intent" are paramount in retaliation cases.

Surely, this Petitioner, and discriminated Petitioners of similar stripe, deserve the right to show motive and intent not to be summarily dismissed from Court.

CONCLUSION

In summary, Petitioner requests Certiorari on two significant theories:

A. There is a conflict in the Circuits concerning the right to preclude the complainant in a retaliation case by the mechanism of summary judgment. With this conflict, the rule in the Tenth Circuit as enunciated in the Romero v. Union Pacific Railroad case (615 F.2d 1303) is the better

rule since motive and intent can never be fully disclosed or ascertained on summary judgment.

B. The use of summary judgment to preclude factual issues was inappropriate in the case at bar and the conclusion that an employer can unilaterally "retire" an employee without a factual determination as to whether or not such retirement was effective is dangerous in a retaliation case, since it can be used as a device to preclude all retaliation claims.

In view of the foregoing, a writ of Certiorari should be issued to review the decision of the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of March, one thousand nine hundred and eighty-five.

Present: HONORABLE WALTER R. MANSFIELD,
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges.

ADELINA F. CICIRELLO,

Plaintiff-Appellant,

v.

NEW YORK TELEPHONE COMPANY,

Defendant-Appellee.

O R D E R

Adelina F. Cicirello appeals from a judgment of the District Court for the Southern District of New York (Kevin Thomas Duffy, Judge) granting summary judgment to the defendant, New York Telephone Company, in a Title VII gender discrimination suit.

Appellant's principal claim was that she had been demoted in retaliation for making previous discrimination claims. Judge Duffy rejected the retaliation claim because the undisputed facts showed that appellant was not demoted, but instead became eligible for and received disability and ultimately pension benefits, all of which were calculated based on the salary level for the position she held prior to the alleged demotion.

For substantially the reasons set forth in Judge Duffy's memorandum decision, the judgment of the District Court is affirmed.

s/Walter R. Mansfield

s/Jon O. Newman

s/Amalya L. Kearse Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties,

it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

(JON)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ADELINA F. CICIRELLO,

Plaintiff,

- against -

83 Civ. 3114 (KTD)

NEW YORK TELEPHONE COMPANY,

Defendant.
----------x

MEMORANDUM & ORDER

APPEARANCES:

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Of Counsel: Sol Mermelstein Esq.

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KEVIN THOMAS DUFFY, D.J.:

Plaintiff, Adelina F. Cicirello, brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq. ("Title VII"), alleging that defendant, New York Telephone Company ("Telco"), retaliated against her because she had filed sex discrimination charges with the Equal Employment Opportunity Commission ("EEOC") and had commenced two prior actions against Telco. Telco moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Cicirello opposes Telco's motion and further asks for an order requiring Telco to comply with her discovery requests. For the reasons set forth below, Telco's motion for summary judgment is granted.

FACTS

A Prior EEOC Proceedings and Actions

Cicirello, who had been an employee

with Telco for over thirty years, brought her first action against Telco in this Court in March 1981. In that action, Cicirello alleged that Telco had (1) violated an expired 1974 Consent Decree of the United States District Court for the Eastern District of Pennsylvania, and (2) discriminated against her because of her sex. Judge Brieant dismissed the action because (1) any attempt to enforce the Consent Decree could be brought only in the Eastern District of Pennsylvania, and (2) Cicirello had never filed a sex discrimination charge with the EEOC and therefore failed to meet the Court's jurisdictional requirements. Cicirello v. New York Telephone Co., Telco's Memorandum of Law in support of Defendant's Motion for Summary Judgment, Exh. A (Endorsement, 81 Civ. 1493, June 19, 1981).

Cicirello then filed a charge with the EEOC on February 5, 1982, alleging

that Telco had discriminated against her because of her sex. After receiving from the EEOC a Notice of Right to Sue, Cicirello failed to commenced a discrimination action within ninety days and thus forfeited her right to bring an action for discriminatory conduct allegedly occurring prior to February 5, 1982.

Finally, in June 1982, Cicirello commenced an action in New York Supreme Court, Nassau County, claiming that Telco had fraudulently violated the expired 1974 Eastern District of Pennsylvania's Consent Decree. The Court dismissed the action for the same reason Judge Brieant dismissed the first action.

B. This Action

On October 1, 1982, after being informed by Telco that she was going to be demoted and transferred to the company's Hempstead office on October 3, 1982, Cicirello became ill and left work. She

then exhausted the fifty-two weeks of company disability benefits to which she was entitled and was immediately retired on a service pension effective October 10, 1983.

On October 11, 1982, while receiving disability benefits and prior to her retirement, Cicirello filed a second charge with the EEOC, this time alleging that Telco had unlawfully retaliated against her for her filing of the February 5, 1982 sex discrimination charge. On January 25, 1983, the EEOC issued a determination stating that "(e)xamination of the evidence in the record indicates that there is not reasonable cause to believe that this allegation is true." Telco's Answer, Exh. D. On this date, the EEOC also issued a Notice of Right to Sue with regard to the matters raised in the retaliation charge. Based on this Notice of Right to Sue, in April, 1983

Cicirello commenced the instant action.

Cicirello alleges that in retaliation for filing EEOC charges and commencing actions Telco, inter alia, continually intimidated and harrassed her, unjustly demoted and transferred her, and gave her harsh and unfair evaluations. Cicirello seeks (1) a declaratory judgment that the complained of acts, policies, practices and procedures of Telco are discriminatory and unlawful employment practices in violation of Title VII; (2) equitable and injunctive relief to correct the conditions complained of; (3) all back wages, lost fringe benefits, and monetary damages resulting from Telco's practices; and (4) all of the costs of this action.

DISCUSSION

For the purposes of Telco's motion for summary judgment, the most significant issue is whether Cicirello was

in fact demoted from Management Assistant to Service Assistant on October 1, 1982. It is undisputed that on October 1, 1982, Cicirello was informed by Telco that she was to be demoted to the position of Service assistant and transferred to the company's Hempstead office on October 3, 1982. Affidavit of Charles Swetz Sec. 5. Cicirello argues that she was demoted when she was notified of the personnel action. Telco, however, asserts that the demotion never became effective because Cicirello's absence due to her disability began on October 1, 1982 and she retired immediately thereafter. Furthermore, Telco has provided overwhelming proof tending to show that Cicirello was not demoted on October 1, 1982.

First, Cicirello admits that Telco did not officially change her job title as of October 1, 1982. Supplementary Affidavit

of Adelina F. Cicirello, at 2. Company records also uniformly reflect that after October 1, 1982, Cicirello retained her Management Assistant title. Second, Cicirello admits that her salary was never reduced as of October 1, 1982, or any subsequent date. Id. Third, Cicirello does not deny that her disability benefits and pension payments were based on her salary as a Management Assistant.

Consequently, it is clear that the effective date of Cicirello's demotion was to be October 3, 1982, but that she left before then. Thus, Cicirello's claim that Telco retaliated against her by demoting and transferring her is wholly without support and Telco's motion for summary judgment dismissing this claim is granted.

Cicirello alleges also that Telco retaliated against her by intimidating and harrassing her, giving her a "G-minus"

evaluation, and threatening her with dismissal. The issue arises whether Cicirello's retirement has rendered these claims moot.

The Supreme Court has frequently stated that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971); see also Oil Workers Unions v. Missouri, 361 U.S. 363, 367 (1960). It is evident that "(t)he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Steffel v. Thompson, 415 U.S. 452, 459n.10 (1974).

It is not disputed that Cicirello was paid all of her fifty two weeks of eligibility for disability benefits. Nor is it disputed that she has remained

totally disabled for work since that time. Consequently, at the least, Cicirello can no longer be considered an active employee of Telco. In addition, based on the papers submitted, there can be no reasonable expectation that Cicirello will resume employment with Telco and that Telco will have an occasion to take any action, retaliatory or otherwise, against Cicirello.

With respect to Cicirello's prayer for declaratory relief in particular, given the severance of Cicirello and Telco's employment relationship, it would be inappropriate for this Court to issue a declaratory judgment or any other form of injunctive or equitable relief. "For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'"

Ashcroft v. Mattis, 431 U.S. 171, 172 (1977) (per curiam), quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937). As Cicirello is not longer an employee of Telco, her request for a declaratory judgment is, in actuality, a request for an advisory opinion, and must therefore, be denied. Furthermore, injunctive relief in this case would also be meaningless given that there is no longer a continuing employment relationship between the parties.

Finally, Cicirello's claim for compensatory damages resulting from "humiliation, embarrassment and mental stress," Complaint P. 16, must also be dismissed. It is a widely held rule that "(d)amages for individual losses are not recoverable under a Title VII claim." Davidson v. Yeshiva University, 555 F. Supp. 75, 80 (S.D.N.Y. 1982); see, e.g., Great American Federal Savings & Loan Association v. Novotny,

442 U.S. 366, 374-75 (1979); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969); Smith v. Hampton Training School for Nurses, 360 F.2d 577 581 (4th Cir. 1966) (en banc). Accordingly, Telco's motion for summary judgment is granted and Cicirello's request for an order requiring Telco to comply with her discovery requests is denied as moot.

SO ORDERED:

Dated: New York, New York
October 10, 1984

KEVIN THOMAS DUFFY,
U.S.D.J.

FOOTNOTES

1. Cicirello's Employee Service Record shows that as of the date of the last entry, posted on October 22, 1983, her job title remained Management Assistant. Supplementary Affidavit of Michael Hertzberg, Exh. A. This Service Record which reflects all payroll changes affecting Cicirello from 1974 through the date of her retirement in 1983, contains no entry in 1982 regarding any demotion of Cicirello or reduction in her pay rate despite the fact that her prior demotion and salary reduction in 1978 is reflected in the document. In addition, a Bell System Employee Injury and Illness Report which was filled out over two months after Cicirello's alleged demotion still shows her job title as Management Assistant. Supplementary Affidavit of Michael Hertzberg, Exh. B.

The computerized calculation of her pension, dated October 17, 1983, shows that

Cicirello's pension payments were based on her salary as a Management Assistant. Supplementary Affidavit of Michael Hertzberg, Exh. C. Indeed, Cicirello's annual pay at retirement is shown as $26,400, which is higher than her $25,500 salary as of October 1, 1982. This is because, in accordance with Telco's pension plan, salary increases which are withheld during periods of disability are credited to employees for purposes of pension calculations. Supplementary Affidavit of Michael Hertzberg, paragraph 5(d).

2. Telco characterizes Cicirello as being "retired". Cicirello, alternatively, argues that he "retirement was effected" by Telco unilaterally and that this should not have been done. Whether Cicirello's contention is true or not is irrelevant because it is undisputed that she is presently unable to work and she has given no indication that she will be

able to work in the near future.

3. At the most, Telco was entirely justified in retiring Cicirello. It is Telco's routine and uniform policy to retire a disabled employee on a service pension if the employee qualifies for such treatment. Telco's Employee Benefits Administrative Guide specifically provides: "Employees with fifteen or more years of service who exhaust benefits will, if disability continues, be treated as pension cases, and handled in accordance with Part IV of this Guide [Retirement and Pensions]." Supplementary Affidavit of Michael Hertzberg, paragraph 6. Although Cicirello complains that Telco should not have unilaterally effected her retirement, she proposes no viable alternative. After her one year sickness absence, Cicirello remained totally disabled and could no longer receive disability benefits. As a result, Telco's only choice was to retire Cicirello

and provide her with a pension.

4. Cicirello claims to have lost backpay. If this were true, it would be recoverable under Title VII. See Grant American Federal Savings & Loan Association v. Novotny, 442 U.S. at 374 ("[Title VII] provides for injunctive relief, specifically including backpay relief."). However, Cicirello does not claim that her salary or her benefits were ever reduced by Telco and thus any claim for backpay is patently unjustified.

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF
PENNSYLVANIA

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

and

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH CO.,
NEW ENGLAND TELEPHONE & TELEGRAPH CO.,
THE SOUTHERN NEW ENGLAND TELEPHONE CO.,
NEW YORK TELEPHONE COMPANY, et al.,

Defendants.

----------x

CIVIL ACTION

NO. 74 1342

CONSENT DECREE

The Equal Employment Opportunity Commission (hereinafter, EEOC), the Secretary of Labor (hereinafter, the Secretary), and the United States of America having filed their Complaint herein, the EEOC pursuant to Sections 706(f)(1) and 707(e) of Title VII, of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq. (hereinafter Title VII), the Secretary pursuant to Sections 6(d), 15(a)(2) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Sec. 201 et seq. (hereinafter, the Equal Pay Act), and the United States pursuant to Executive Order 11246, as amended (hereinafter, the Executive Order), and the defendants having filed their Answer denying the allegations in the Complaint, and the parties having waived hearings and findings of fact and conclusions of law, the follow-

ing order is entered without any admission by any of the Defendants or finding by the Court of any violation by any of the Defendants of any of the above-mentioned statutes or Executive Order, or any regulations adopted pursuant thereto.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED as follows:

.....

I. DURATION OF THE DECREE

A. The Court retains jurisdiction of this action for entry of such orders as are necessary to effectuate the provisions of this Decree. The term of this Decree shall be five years from this date, but as to the specific issues dealt with herein, the Defendants are permanently enjoined from violating the provisions of the Equal Pay Act, Title VII, and the Executive

Order. Upon certification to this Court that the payment of back wages ordered in PART A, Section II, has been made, that portion of this Decree will be dissolved as having been satisfied. Defendants waive none of their rights to move for dissolution or modification of this Decree at any time in addition to those specifically provided for in Subsection B below.

.....

A. Leon Higgenbothaum

SO ORDERED:

_____

Judge, United States District Court

AMERICAN TELEPHONE & TELEGRAPH CO., for itself and on behalf of its associated telephone companies as set forth herein.

BY: _____

CHARLES RYAN

_____

CLARK G. REDICK
American Telephone & Telegraph Co.

Mrs. Adelina Cicirello

Psychiatric Evaluation

June 11, 1984

V. CONCLUSIONS

Mrs. Cicirello suffers with a situational personality disturbances, adjustment reaction of adult life (DSM 11.307.3.) Her DSM III diagnosis is 309.28. adjustment disorder with mixed emotional features. Her condition is job related and is characterized by periodic anxiousness, depression, tearfulness, sleeplessness, disturbed sleep (nightmares), headaches, anger at the New York Telephone Co., hurt feelings, obsessional preoccupation with the injustice she feels was perpetrated against her by her employer after years of devoted and conscientious service. Her condition is presently moderate in degree but becomes easily more severe or is periodically exacerbated whenever she things about it: which is fairly often.

I believe that Mrs. C. was to begin with, a mentally healthy, well adjusted person, a pleasant, plain individual with a sturdy and solid ego, at least of average intelligence well adapted to life. The daughter of modest, average, moderately strict, caring and loving parents, the youngest sister of five siblings, she grew up into a slightly shy but sociable young woman psychologically and culterally normal. She was able to go to school, to adapt to the strictness of Roman Catholic education without developing scrupulosity, to date, to marry, to have a good sexual adjustment, to develope into an autonomous, generational, adult. She had the personality strengths and the adaptive skills to survive a difficult marriage, to divorce her immature husband without undue bitterness and divisiveness and to raise, practically single-handedly, a son, who in turn became a healthy, well adapted and

responsible member of society. Similarly, she had the emotional strengths and the life-coping abilities to enter a career, to perform within it with at least moderate distinction, to grow within it, thus becoming (since age 18) a self-supporting member of society.

In summary and conclusions, I believe that Mrs. Cicirello's pre-morbid personality has basically been a healthy one. Her obsessional and compulsive propensities are minimal, well sublimated and adaptive, i.e., they have served her well in life and on her job. She is a person who has been able to form emotional ties and friendships, to develop a sense of humor, to be sexual and orgasmic, to work satisfactorily. Having performed at a fairly high level at her job for almost three decades, having received promotions and satisfactory evaluations (from the Telephone Co., and from the

National Alliance of business,) I can not and do not believe that she was a "risk personality", i.e., some one unduly fragile and unduly vulnerable to the ordinary stress and strains of living and of adulthood. I must therefore conclude that her recent and current psychiatric condition has indeed been caused by her unfortunate experience at her employment: and is, indeed, job related.

s/

Vincenzo Conigliaro, M.D.

Office - Supreme Court, U.S.
FILED
JUL 5 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ADELINA F. CICIRELLO,

Petitioner,

—against—

NEW YORK TELEPHONE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TO THE SECOND CIRCUIT

MEMORANDUM FOR NEW YORK TELEPHONE COMPANY IN OPPOSITION

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Statement Pursuant to Rule 28.1

New York Telephone Company ("NYT") is a wholly-owned subsidiary of NYNEX Corporation ("NYNEX"), which has outstanding securities in the hands of the public. NYT has no subsidiaries or affiliates other than corporations that are wholly owned by NYNEX either directly or indirectly.

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ADELINA F. CICIRELLO,

Petitioner,

—against—

NEW YORK TELEPHONE CO.,

Respondent.

MEMORANDUM FOR NEW YORK TELEPHONE COMPANY IN OPPOSITION

The petition for a writ of certiorari should be denied because (1) there is no conflict among the circuits, as Petitioner alleges, (2) the questions of "constructive discharge" and "involuntary retirement" do not raise issues justifying review by this Court, and (3) the petition raises no important questions of federal law having widespread ramifications.

1. In claiming a conflict between the decision below and *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980), Petitioner totally misperceives the nature of the decision below. The dismissal of Petitioner's claim was not based on any finding regarding Respondent's "intent and motive," or on any finding that Respondent did not retaliate against Petitioner. Indeed, the two rulings in this case—that Petitioner was not in fact demoted and that she could not pursue her claim because it has become moot—required no finding on the question of retaliation. Rather, the plain significance of the mootness

finding is that because (1) Petitioner's claims of harassment were not susceptible of a back pay remedy (*DuVall v. Postmaster General*, 585 F.Supp. 1374, 1377 (D.D.C. 1984)), (2) because compensatory damages are not available under Title VII (*Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 374-75 (1979)), and (3) because the injunctive relief normally available to remedy proven claims of harassment would be inappropriate in view of the lack of a continuing employment relationship (*Backus v. Baptist Medical Center*, 671 F.2d 1100 (8th Cir. 1982); *DuVall v. Postmaster General*, *supra*; *Gillead v. Defense Supply Agency*, 11 FEP Cases 1180 (S.D.N.Y.), *aff'd mem.*, 22 FEP Cases 840 (2d Cir. 1975)), Petitioner may not pursue her claim even if Respondent committed acts of retaliation. Petitioner's position makes no more sense than if she argued that *Romero* would conflict with a decision granting summary judgment in a retaliation action on the ground that the action was commenced after the statute of limitations had run.

2. Petitioner's invocation of the concepts of "constructive discharge" and "involuntary retirement" do not raise issues justifying review by this Court. A review of Petitioner's own characterization of her complaint (Pet., p. 7) as well as the opinion of the District Court (Pet., A4-A19) shows that the allegation of constructive discharge was not made below. And while Petitioner did argue below, in substance, that she had been involuntarily retired, the District Court properly ruled (a) that the contention was irrelevant to the issue of mootness, and (b) that Respondent was "entirely justified in retiring Cicirello" in conformity with its "routine and uniform policy" in similar situations, and particularly in light of Petitioner's failure to propose any viable alternative. (Pet., A17-A18)

3. Despite Petitioner's exaggerated attempts to invest this case with global ramifications—such as her vacuous references to "constitutional import" (Pet., p. 14) and "a universal method of frustrating all retaliation actions" (Pet., p. 15)—it is

simply an individual action, based on a narrow and unusual set of facts, that raises no important question of federal law requiring the time and effort of this Court to decide.

Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: July 1, 1985